



Signed and Filed: September 02, 2009

Dennis Montali

DENNIS MONTALI
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re)	Bankruptcy Case
)	No. 02-30419DM
CENTRAL EUROPEAN INDUSTRIAL)	Chapter 11
DEVELOPMENT COMPANY, LLC d/b/a)	
CEIDCO,)	
)	
Debtor.)	
)	
In re)	Bankruptcy Case
)	
THE KONTRABECKI GROUP LP,)	No. 02-30421DM
)	
Debtor.)	[Administratively
)	Consolidated]
ARON M. OLINER, et. al.,)	
)	Adversary Proceeding
Plaintiffs,)	No. 03-3264DM
)	
vs.)	
)	
JOHN KONTRABECKI, et. al.,)	
)	
Defendants.)	

MEMORANDUM DECISION ON MOTIONS TO STRIKE AND
FOR PRECLUSION ORDER¹

The following are the court's rulings on plaintiff Lehman Brothers Holdings, Inc.'s ("Lehman") Motion to Strike the

¹ This Memorandum Decision constitutes the court's findings of fact and conclusions of law under Fed. R. Bankr. P. 7052.

1 Declaration of John Kontrabecki Dated January 31 [sic],² 2009, and
2 for Entry of Preclusion Order. Lehman's motion ("Motion to
3 Strike") seeks to strike John Kontrabecki's ("Kontrabecki")
4 declaration signed and filed on January 29, 2009 (the "January
5 Declaration") in opposition to Lehman's Motion for Partial Summary
6 Judgment as well as in support of his own Motion for Partial
7 Summary Judgment, and requests that the court preclude ("Motion to
8 Preclude") any consideration of that declaration or subsequent
9 revisiting of the question of Kontrabecki's intent in connection
10 with the share dilution transaction ("SDT"). The court will deny
11 Lehman's Motion to Strike, in part, grant it, in part,³ and will
12 grant Lehman's Motion to Preclude.⁴

13 **I. Motion to Strike - Fifth Amendment Issues.**

14 Kontrabecki had every reason to claim the Fifth Amendment
15 privilege in 2003. There is no need to speculate as to the
16 tactical advantage of doing so; there were clear threats that he
17 was or would become the subject of a criminal investigation.
18 Lehman argues that had Kontrabecki not done so, the unwind of the
19

20 ² Although Lehman refers to John Kontrabecki's declaration as
21 dated January 31, 2009, it was actually signed and filed on
22 January 29, 2009.

23 ³ As discussed later, the court is not at this time
24 addressing the paragraph-by-paragraph evidentiary objections to
the January Declaration.

25 ⁴ In its Order on Lehman's Motion for Protective Orders Re
26 Subpoenas and Kontrabecki's Motion to Compel Trustee to Supplement
Response, filed August 23, 2009, the court deferred ruling on
27 Lehman's motion insofar as it relates to U.S. Government
Communications Documents. See Order on Motions for Protective
28 Orders Re Subpoenas and to Compel Trustee to Supplement Response,
2:7-10, dkt. no. 1854. Given the present ruling on the Motion to
Strike, that portion of Lehman's motion is DENIED.

1 SDT might have been accomplished much earlier. That is pure
2 speculation at this point, and more importantly, if it is so, then
3 a delayed unwind is merely the consequence of a properly invoked
4 privilege.

5 Now Kontrabecki wishes to waive his Fifth Amendment privilege
6 and testify at trial and in opposition to Lehman's Motion for
7 Partial Summary Judgment. More specifically and principally, he
8 wants the court to consider the January Declaration to demonstrate
9 his subjective intent at the time of the SDT. He contends that
10 Lehman cannot demonstrate legal prejudice if his testimony is
11 considered.

12 While the court is not unsympathetic about the many years
13 that have gone by since the events of January and February, 2003,
14 and memories of witnesses fade, it is not persuaded and wholly
15 unconcerned that Kontrabecki will be able to "fashion custom-
16 crafted testimony" (as Lehman cautions) that defeats the
17 liabilities he faces. And as will be explained below, Lehman will
18 not be put to the risk of litigating the intent issues again.

19 Of greater significance than all of the other factors,
20 however, is the fact that Lehman knew, by early August, 2003, that
21 the chances of prosecution of Kontrabecki had substantially
22 diminished because an Assistant U.S. Attorney ("AUSA") reported to
23 Lehman's counsel by letter that ". . . we have not solved the
24 problem of the dedication of investigative resources to this
25 case."⁵ Then, just days later, Lehman's counsel had a telephone
26 conversation with a Special Assistant United States Trustee

27 ⁵ The court agrees with Kontrabecki that the AUSA's letter
28 should have been produced in response to his discovery request.

1 ("UST"), who reported that ". . . although she and her office
2 remained interested in pursuing a prosecution of Mr. Kontrabecki,
3 the position of the U.S. Attorney's office foreclosed any
4 realistic prospect of doing so."

5 Certainly those two communications did not mean that the
6 "file was closed" and Kontrabecki was home free, but they
7 certainly were relevant facts which Kontrabecki should have known.
8 And even if Lehman's counsel adhere to their belief that they had
9 an ethical obligation to their client not to inform Kontrabecki of
10 the AUSA's letter, by July, 2004, when Kontrabecki wanted to waive
11 his Fifth Amendment privilege in part, Lehman did not advise the
12 court (even in camera) that the situation had changed. Thus, the
13 court's decision at a hearing on July 23, 2004, to strike
14 Kontrabecki's July 19, 2004 Declaration was based on less than
15 complete information.

16 When these matters first came to light during oral argument
17 on March 31, 2009, the court was left with a very unpleasant and
18 frankly disconcerting feeling about the fundamental lack of
19 fairness to Kontrabecki to know now that the risk of prosecution
20 six years ago was demonstrably less than he or his counsel or the
21 court could possibly have imagined at the time. Preliminarily the
22 court felt that a certain odor of impropriety had contaminated the
23 entire case, looking all the way back to the coercive monetary
24 sanctions, and then to the more serious incarceration. The only
25 way to clear the air at that time seemed to be to permit
26 Kontrabecki to testify fully and completely about every aspect of
27 his defenses at trial, if not in connection with any other relief
28 he may have chosen to seek.

1 Now that the facts have been fully explained, however, the
2 court has an entirely different view of the matter. More
3 particularly, now the court knows that it lacked another piece of
4 critical information on July 23, 2004, viz., that Kontrabecki was
5 prepared to waive his Fifth Amendment privilege and testify about
6 all matters relevant to his defense. Nevertheless, he remained
7 silent despite the court's encouragement to his counsel:

8 "If you wish to renew this motion or in any way have
9 Mr. Kontrabecki testify in order to get off the coercive
sanctions, you're free to do it . . ." Transcript, July
23, 2004, 201:22-24.

10 Then a little later:

11 "Let's say tomorrow you come up with some new
12 information that Mr. Kontrabecki's prepared to testify to
or a new - a broader scope of timeframe or subject matter.
13 And you say let's try again, I'll hear you. Its my
obligation to hear you." Id. at 202:24 - 203:3

14 Instead of hearing from Kontrabecki before incarceration
15 then, the court now has learned from Kontrabecki's April 21, 2009,
16 declaration that:

17 ". . . my willingness to completely waive the
18 privilege was not brought to the court's attention and I
was not able to testify."

19 From the foregoing the court believes that any residual
20 effect of the non-disclosure of the AUSA's August 4, 2003, letter
21 and the UST's followup report was fully dissipated - the odor was
22 gone!

23 The remaining question, then, is what to do about the present
24 state of affairs and the forthcoming trial.⁶

26 ⁶ The questions before the court are not about unfiled
27 sanctions motions, on which no opinion is being expressed. Nor
28 does the court see a need to resolve the competing experts'
opinions about what should or should not have been disclosed, nor

1 After balancing the competing equities, and notwithstanding
2 the fact that Kontrabecki appears to have been solely responsible
3 for much of what happened after he "was not able to testify",
4 keeping him completely silenced is fair, necessary or appropriate.
5 The court agrees with the authorities cited by Kontrabecki
6 confirming a strong presumption in favor of permitting testimony
7 at trial notwithstanding a prior claim of Fifth Amendment
8 immunity. It will exercise its discretion to permit such
9 testimony.

10 Lehman has had ample opportunity to take discovery from
11 Kontrabecki without concern over his invoking the Fifth Amendment.
12 Kontrabecki's counsel communicated his willingness to waive his
13 Fifth Amendment privilege in April, 2007. Then in April, 2008,
14 Kontrabecki responded to written discovery regarding intent
15 issues. Since then, he has been deposed and can be again if
16 necessary.

17 In summary, Kontrabecki will be allowed to testify on a
18 limited basis at trial, and his January Declaration will not be
19 stricken in its entirety. But because the court accepts Lehman's
20 position on the intent issue, as discussed below, Kontrabecki will
21 not be allowed to testify on that issue, nor on others (such as
22 "control") that have been foreclosed for other reasons not
23 addressed in the pending motions. The Motion to Strike will be
24 GRANTED, in part, and DENIED, in part.

25 _____
26 whether any ethical duties were breached, nor whether Kontrabecki
27 could have learned about the AUSA's and UST's position themselves.
28 The court has also been presented with the question of whether
Kontrabecki waived his attorney client or work product privileges
by submitting his April 21, 2009, declaration. The court agrees
with Kontrabecki that there was no such waiver.

1 Since the court has disposed of the parties' motions for
2 partial summary judgment by two memorandum decisions issued
3 recently, it is not sure whether it is necessary to deal with the
4 outstanding objections to specific paragraphs of the January
5 Declaration. Certainly the declaration will not be admissible at
6 trial without Lehman's consent, so the parties should be prepared
7 to advise the court whether or not it needs to deal with those
8 pending objections.

9 **II. Motion to Preclude - Intent Issues.**

10 Kontrabecki complains about how the issue of his intent has
11 been foreclosed. First, as early as September, 2003, the court
12 found that Kontrabecki knowingly and intentionally caused the SDT
13 and that his actions were adverse to the interests of TKG. See
14 Findings of Fact #11, #14, and Conclusion of Law #19, Sept. 17,
15 2003, dkt. no. 276. Then, it found that Kontrabecki's acts were
16 willful. See Conclusions of Law #3 and #4, March 30, 2004, dkt.
17 no. 537.

18 Kontrabecki argues that those findings and conclusions were
19 regarding Lehman's and TKG's First Cause of Action, Violation of
20 Bankruptcy Code § 362. But willful is willful, and intentional is
21 not accidental, regardless of the legal theory that applies to the
22 irrefutable facts. Thus, early on in this case a critical fact
23 was found without serious refutation, if any. See Lehman's
24 Memorandum in Support of the Motion to Strike, n. 16.

25 While it is true that the court made those determinations
26 during the time Kontrabecki knew of the threat of criminal
27 prosecution but had not learned of the AUSA's position
28 communicated to Lehman's counsel in August, 2003, he later did ask

1 the court to reconsider those early rulings years after he had
2 made a conscious decision to waive the Fifth Amendment. See
3 Kontrabecki's Motion for (1) Reconsideration of Prior Orders Granting
4 Motion for Partial Summary Judgment on First Claim for Relief for
5 Violation of the Automatic Stay, and (2) Order Dismissing First Claim
6 for Relief, filed December 24, 2008, dkt. no. 1705. In that motion,
7 Kontrabecki did not offer any testimony to rebut the 2003 findings
8 about the wilfulness of his conduct.

9 Later, Lehman's Countermotion for Partial Adjudication
10 and Protective Order Re Proof of Intent Issues was filed on
11 August 2, 2007, and sought as a matter of law a ruling on
12 intent. It was not argued until October 4, 2007.
13 Kontrabecki had the facts to offer in opposition, but did not
14 do so despite ample time. His counsel's subsequent plea that
15 he did not think it necessary falls on deaf ears. Neither
16 side in this case has been shy about filing briefs and
17 declarations on any conceivable subject. The fact is
18 Kontrabecki had nothing to rebut as Lehman made its argument
19 about intent as a matter of law. The court previously
20 determined that the procedure was not improper - Kontrabecki
21 had sufficiently raised the intent issue in his attempt to
22 take discovery of Piotr Kukulka so Lehman was justified in
23 raising the issue. In the October 10, 2007 Memorandum
24 Decision regarding the aforementioned discovery motion, the
25 court addressed the substance of the intent issue and dealt
26 with it. Kontrabecki has not convinced the court to go there
27
28

1 again.⁷ The Motion to Preclude will be GRANTED.

2

3

END OF MEMORANDUM DECISION

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27 ⁷ That said, the court ignores both parties' arguments about
28 applicable standards for reconsideration. There are no final
orders in this adversary proceeding.